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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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11 Aqua Connect,) CV 11-05764 RSWL (MANx)
12 Plaintiff,)
13 vs.) ORDER RE: DEFENDANT CODE
14 Code Rebel, LLC; Arben) REBEL, LLC'S MOTION FOR
15 Kryeziu; Volodymyr Bykov;) LEAVE TO FILE
16 and DOES 1 through 10,) COUNTERCLAIMS [86]
17 Defendants.)

18 Currently before the Court is Defendant Code Rebel,
19 LLC's ("Code Rebel") Motion for Leave to File
20 Counterclaims against Plaintiff Aqua Connect
21 ("Plaintiff") [7]. The Court, having considered all
22 papers, arguments submitted and heard pertaining to
23 this Motion, **NOW FINDS AND RULES AS FOLLOWS:**

24 Code Rebel's Motion is **DENIED**.

25 **I. INTRODUCTION**

26 Plaintiff brings this Action against Defendants
27 Code Rebel, Arben Kryeziu, and Volodymyr Bykov
28 (collectively "Defendants"), alleging that Defendants

1 wrongfully reverse engineered Plaintiff's Aqua Connect
2 Terminal Server ("ACTS") software and subsequently
3 produced and distributed a competing software product,
4 IRAPP TS, in violation of California law [77]. Code
5 Rebel, who has already served its Answer in this case
6 [31, 85], presently seeks leave of Court to file three
7 libel-based and three antitrust-based counterclaims
8 against Plaintiff as a result of information that Code
9 Rebel allegedly learned during discovery [86]. For the
10 reasons set forth below, the Court **DENIES** Defendant's
11 Motion for Leave to File Counterclaims.

12 **II. DISCUSSION**

13 **A. Legal Standard**

14 A compulsory counterclaim is a counterclaim that
15 must be filed in a pleading if the counterclaim arises
16 out of the same transaction or occurrence as the
17 opposing party's claim and does not require the
18 addition of another party over which the court cannot
19 acquire jurisdiction. Fed. R. Civ. P. 13(a). However,
20 if a counterclaim matures after a pleading is filed, or
21 if it is acquired by a party after serving an earlier
22 pleading, the after-acquired counterclaim is
23 technically not compulsory, and a party may supplement
24 its pleading in order to assert such a "permissive"
25 counterclaim as allowed by the court. See Fed. R. Civ.
26 P. 13(e); 6 Fed. Prac. & Proc. Civ. § 1428 (3d ed.).
27 In determining whether a party should be allowed to
28 amend its pleadings pursuant to Federal Rule of Civil

1 Procedure 13, courts rely on the standard of Federal
2 Rule of Civil Procedure 15 for granting leave to amend.
3 F.D.I.C. v. Twin Dev., LLC, No. 10-CV-2279-BEN KSC,
4 2012 WL 1831639 at *6 (S.D. Cal. May 18, 2012); Healy
5 v. DJO, LLC, No. 11CV673-IEG JMA, 2011 WL 5118748 at
6 *1-*2 (S.D. Cal. Oct. 28, 2011).

7 Amendment of a pleading under Rule 15 is generally
8 permitted in accordance with the Federal Rule's liberal
9 pleading standard unless the opposing party makes a
10 showing of bad faith, undue delay, prejudice by virtue
11 of allowing the amendment, or futility of the
12 amendment. See Foman v. Davis, 371 U.S. 178, 182
13 (1962); Zucco Partners, LLC v. Digimarc Corp., 552 F.3d
14 981, 1007 (9th Cir. 2009). Prejudice to the opposing
15 party carries the greatest weight in determining
16 whether to grant leave to amend. Eminence Capital, LLC
17 v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003);
18 Bowles v. Reade, 198 F.3d 752, 758 (9th Cir. 1999).
19 "Absent prejudice, or a strong showing of any of the
20 remaining Foman factors, there exists a *presumption*
21 under Rule 15(a) in favor of granting leave to amend."
22 Eminence Capital, 316 F.3d at 1052 (emphasis in
23 original).

24 **B. Analysis**

25 Although Code Rebel is correct in stating that
26 leave to amend should be freely given when justice so
27 requires, Fed. R. Civ. P. 15(a)(2), "[i]t is within the
28 court's discretion to deny leave to amend where the

1 proposed counterclaim presents a cause of action
2 unrelated to the pending action." Hewlett-Packard Co.
3 v. Repeat-O-Type Stencil Mfg., No. C-92-3330 DLJ, 1995
4 WL 552168 at *5 (N.D. Cal. Aug. 30, 1995). Denial is
5 particularly appropriate when seemingly unrelated
6 counterclaims are proposed late in the litigation, for
7 belated interjection of such claims may be "unduly
8 disruptive" of the underlying Action. Harbor Ins. Co.
9 v. Continental Bank Corp., 922 F.2d 357, 360-61 (7th
10 Cir. 1990). See also 6 Fed. Prac. & Proc. Civ. § 1428
11 (3d ed.) ("[U]nrelated claims, particularly if they are
12 asserted relatively late in the proceedings, may be
13 more properly left to an independent suit.").

14 Here, Code Rebel offers two explanations for how
15 its after-acquired counterclaims are sufficiently
16 related to Plaintiff's claims so as to justify that
17 they be tried together rather than in separate
18 proceedings. First, Code Rebel contends that its
19 counterclaims "concern[] Plaintiff's conduct during the
20 marketing and selling of its [ACTS] computer program –
21 the alleged reduced sales of which form the basis for
22 Plaintiff's damages calculations in the [Second Amended
23 Complaint]." Mot. 10:15-19. Second, Code Rebel
24 asserts that Plaintiff's conduct, as alleged in the
25 counterclaims, "reach[es] the level of unconscionable
26 acts" that is necessary for Code Rebel to prevail on an
27 affirmative defense of unclean hands, which Code Rebel
28 has asserted in this case. Id. at 10:20-11:4.

1 However, neither of these explanations sufficiently tie
2 Code Rebel's counterclaims to the pending Action for
3 purposes of amending Code Rebel's pleading at this
4 stage of litigation. Plaintiff's claims focus entirely
5 on Defendants' alleged reverse engineering of ACTS,
6 whereas Code Rebel's counterclaims address Plaintiff's
7 alleged libelous representations to third parties and
8 its sale of the ACTS program at prices below cost.
9 Quintana Decl., Ex. A, 4:6-13. The alleged connection
10 between Defendant's counterclaims and Plaintiff's
11 Action is tenuous, at best, and is not sufficiently
12 related to the underlying transactions and occurrences
13 so as to justify the assertion of Code Rebel's
14 counterclaims at this late stage of litigation, where
15 discovery closed three months ago and the date for
16 trial is only two months away. See Agar Corp., Inc. v.
17 Multi-Fluids Inc., No. CIV. A. H-95-5105, 1998 WL
18 425474 at *4 (S.D. Tex. Apr. 17, 1998) (denying
19 defendants leave to file after-acquired counterclaims
20 because they were "not compulsory counterclaims and
21 would be more appropriately asserted in an independent
22 action, especially where adding these claims at this
23 point in time would unnecessarily delay the trial"),
24 aff'd sub nom. Agar Corp., Inc. v. Multi-Fluid, Inc.,
25 215 F.3d 1340 (Fed. Cir. 1999); Magnesystems, Inc. v.
26 Nikken, Inc., 933 F. Supp. 944, 952-53 (C.D. Cal. 1996)
27 (denying defendants leave to file counterclaims under
28 Fed. R. Civ. P. 13(e) because the counterclaims would

1 require new discovery, prolong litigation, "entirely
2 change the focus of [the] case and, potentially,
3 prejudice the Plaintiff"); All W. Pet Supply Co. v.
4 Hill's Pet Prods. Div., Colgate-Palmolive Co., 152
5 F.R.D. 202, 204-05 (D. Kan. 1993) ("[T]o permit [the
6 defendant] to assert its supplemental counterclaim less
7 than one month in advance of the date this case is set
8 for trial will complicate trial preparation and will
9 inevitably result in delay of trial. . . . While [the
10 defendant] agrees to limit and expedite the discovery,
11 the time spent on such discovery will prevent both
12 parties from devoting the necessary time to adequately
13 prepare to address the main issues in dispute in this
14 case."). As the court noted in Samick Music
15 Corporation v. Delaware Music Industries, Inc., "[t]he
16 issues in the original complaint are nearing the trial
17 stage and to interject issues . . . of a very different
18 character at this stage would be prejudicial to the
19 plaintiff." No. Civ. A. No. 91-23-CMW, 1992 WL 39052
20 at *7 (D. Del. 1992). Thus, the Court **DENIES** Code
21 Rebel's Motion because the filing of Code Rebel's
22 unrelated counterclaims this late in the litigation
23 would be unduly prejudicial to Plaintiff. See Foman,
24 371 U.S. at 182.

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1 **III. CONCLUSION**

2 Based on the foregoing, the Court **DENIES** Code
3 Rebel's Motion for Leave to File Counterclaims.

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5 **IT IS SO ORDERED.**

6 Dated: June 11, 2013.

7
8 RONALD S.W. LEW

9 **HONORABLE RONALD S. W. LEW**

10 U.S. District Court Judge
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